IN THE MISSOURI SUPREME COURT

CHARZETTA STEELE,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. SC92520
	)	
SHELTER MUTUAL INS. CO.,	)	
	)	
Respondent.	)	

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal originated as an action for benefits under the uninsured motorist part of an insurance policy issued by the defendant. The trial court granted the insurer's Motion for Summary Judgment. The insured passenger appealed from this ruling. After an opinion by the Court of Appeals, this Court granted transfer of this matter. Jurisdiction is founded upon Article V, §10 of the Missouri Constitution and Rule of Civil Procedure 83.04 allowing this Court to transfer a matter after opinion by the Court of Appeals.

STATEMENT OF FACTS

Justin Steele, a child riding as a passenger in a day care van, was seriously injured by an uninsured motorist that struck the day care van. Legal File ("LF") 4. Shelter Mutual Insurance Company issued an insurance policy that covered that day care van, which included a provision for uninsured motorist coverage. LF 11. Justin was not an insured for that uninsured motorist coverage as defined by the policy. LF 12-14.

The trial court granted the insurance company's Motion for Summary Judgment. LF 100. This appeal followed.

POINT RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SHELTER MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT BECAUSE AS A MATTER OF PUBLIC POLICY PASSENGERS IN VEHICLES ARE ENTITLED TO UNINSURED MOTORIST COVERAGE IN THAT THE UNINSURED MOTORIST STATUTE REQUIRES ANYONE WHO IS AN INSURED MUST BE PROVIDED UNINSURED MOTORIST COVERAGE, AND THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW MANDATES THAT PASSENGERS, SINCE THEY ARE "USING" THE VEHICLE, ARE INSUREDS.

Francis-Newell v. Prudential Ins. Co. of America, 841 S.W.2d 812 (Mo. App. 1992)

Mo. Rev. Stat. § 379.203

Mo. Rev. Stat. § 303.190

ARGUMENT

Standard of Review: The standard of review on appeal from the granting of a motion for summary judgment is de novo. *Todd v. Missouri United School Ins. Council,* 223 S.W.3d 156, 160 (Mo. 2007).

Charzetta Steele's argument here is straightforward: In an automobile insurance policy, by statute, uninsured motorist coverage must be extended to anyone who is an insured. Pursuant to the Motor Vehicle Financial Responsibility Law, anyone "using" the vehicle must be an insured. "Using" includes passengers. Therefore, passengers, by statute, are insureds and must be provided uninsured motorist coverage.

Before delving into the law, the practicalities of providing uninsured motorist coverage to passengers are compelling. Those without uninsured motorist coverage of their own, by necessity, are those who do not own cars. When someone is hurt in an accident such as this, some entity must pay the medical bills, whether it is automobile coverage, health insurance, or the State of Missouri. If it is not the automobile coverage, and there is no health insurance due to employment that does not provide such coverage, inevitably the burden of paying for these injuries falls to the State of Missouri. This is contrary to the stated intent of the Missouri General Assembly, that automobile insurers are to bear the costs of automobile accidents – not the injured person, and not the State of Missouri. *See generally Halpin v. American Family Mut. Ins. Co.,* 823 S.W.2d 479, 482 (Mo. banc 1992). If passengers are not provided uninsured motorist

coverage, then the burden of paying the costs of these accidents shifts to someone besides the automobile insurers.

Turning to the law, the duty to provide uninsured motorist coverage is set forth in Mo. Rev. Stat. § 379.203, which provides that every automobile insurance policy must provide uninsured motorist coverage "for the protection of persons insured thereunder." There is no question the Shelter policy here does not include passengers as "insureds thereunder." The issue is whether such a limiting definition in the Shelter policy violates § 379.203 and the Motor Vehicle Financial Responsibility Law ("MVFRL"), Mo. Rev. Stat. § 303.010 *et seq*.

The MVFRL, adopted by the General Assembly in 1987, provides that all owner's policies of insurance (the relevant type of policy here) "Shall insure the person named therein, and any other person, as insured, using any such motor vehicle." Mo. Rev. Stat. § 303.190. The MVFRL, therefore, mandates that insurance must be provided to any person using the vehicle. The issue, then – really the only issue in this appeal – is whether a passenger is "using" the vehicle pursuant to the MVFRL.

The most recent case to address this issue is *Byers v. Shelter Mut. Ins. Co.*, 271 S.W.3d 39 (Mo. App. 2008), which the trial court here felt obligated to follow. Unfortunately, the *Byers* court chose to skirt any real analysis of the issues relevant to its decision and, most importantly, relied on law decided prior to the passage of the MVFRL. The court just stated that, as opposed to the MVFRL, the uninsured motorist statute has different policy considerations. That misses the

point. The only policy considerations that need to be considered are those set forth in the plain language of the statute, because the legislature has decreed that if someone is using a vehicle, then uninsured motorist coverage must be provided. The statute does not provide any wiggle room.

This statement by the court in *Byers* was based on *Francis-Newell v. Prudential Ins. Co. of America*, 841 S.W.2d 812, 814-5 (Mo. App. 1992). *Francis-Newell* actually found coverage for a passenger under the uninsured motorist provisions of the policy, finding that the language in the insurance policy (which, interestingly, tracked the statutory scheme) required uninsured motorist coverage for passengers. The court rejected the interpretation of § 303.190 found in *Waltz v. Cameron Mut. Ins. Co.*, 526 S.W.2d 340 (Mo. App. 1975), saying in full:

> For this court to blindly follow the language in *Waltz* would result in an unwarranted grafting of requirements that are necessary to find coverage under automobile liability provisions upon separate and distinct requirements for finding coverage under uninsured motorist provisions. Prudential's policy distinctly separates policy provisions that are applicable to liability coverage from those applicable to uninsured motorist coverage. The nature of liability coverage is unlike that of uninsured motorist coverage. Although it may be appropriate to require that a person, in order to be covered by liability insurance, have or exercise some supervisory control over a particular automobile in which he or she is riding, that

> requirement does not logically follow in order for a passenger to be insured under uninsured motorist coverage.

841 S.W.2d at 815. In other words, in order to distinguish *Waltz*, the *Francis-Newell* court stated that while it might be understandable to exclude passengers from liability coverage, such a limitation was not necessary for uninsured motorist coverage.

This discussion of the interplay between *Francis-Newell* and *Waltz* will be discussed further below. But contrary to the court's statement in *Byers*, there are no policy considerations to exclude coverage here. This is highlighted by the statutory scheme under which the *Waltz* court operated. The uninsured motorist statute, Mo. Rev. Stat. § 379.203, required and requires coverage for those insured "thereunder," i.e. the insurance policy. If Missouri operated under pre-1987 law, the arguments made here by Shelter would be correct: an insured's status was determined solely by the insurance policy, as the statute did not mandate that anyone (relevant for our purposes) be insured. If the insurance policy excluded someone as an insured, they would not be covered under the uninsured motorist parts of the policy.

As discussed below, though, the MVFRL changed all that. Now, certain individuals – including passengers – must be covered under the law. That is why *Francis-Newell*, for our purposes, is such an interesting case. The *Francis-Newell* court analyzed the word "use" in an insurance policy where (just like the statute) the word "use" was not defined. The conclusion the court came to, after an

extended discussion, was that there was no question a passenger "uses" an automobile. 841 S.W.2d at 814-5.

If that is true, how can this court ignore a statutory scheme that those insured under the policy must be provided uninsured motorist coverage, and that everyone "using" the car is an insured?

Before discussing the caselaw on the definition of "using" under the MVFRL, though, it is important to discuss why the cases decided under the "old" MVFRL – known as the Motor Vehicle Safety Responsibility Law – do not apply. The easiest way to discuss this is in the context of the family exclusion.

Put simply, the family exclusion – excluding coverage when one family member sues another – was valid under the old law, and eliminated under the MVFRL. The reason why it was good under the old law was discussed in *American Family Mut. Ins. Co. v. Ward*, 789 S.W.2d 791, 795 (Mo. banc 1990): ". . . public policy, at least in 1985, was that the procurement and the extent of automobile liability insurance coverage was voluntary, not mandatory. . . . A corollary of [this] rule is that the parties to a voluntary insurance contract may agree to such terms and provisions as they see fit to adopt." As a result, there could be no public policy requirements that grew out of the old law, because there were no public policy requirements. At the time, whether an individual was insured under the policy was solely a matter of determining whether the policy was ambiguous, as Shelter attempts to do here.

However, it is not 1985, and the "new" MVFRL has certainly been interpreted since then. Of note is that "using" is not defined by the statute. The courts are not in doubt, though, what "using" means: "It is perfectly clear that an automobile is being used by an individual who is travelling in it regardless of whether it is being operated by him or by another . . . One may 'use' an automobile without personally operating it, as the term is broader than operation." *Francis-Newell v. Prudential Ins. Co. of America*, 841 S.W.2d 812, 814-5 (Mo. App. 1992). If the MVFRL meant "operating" instead of "using," why did it not use that term?

The *Francis-Newell* court did discuss "using" in the MVFRL context in its discussion of *Waltz*, the uninsured motorist case decided under the old law. There are three reasons why this discussion in *Francis-Newell* does not apply to the instant case: first, the discussion of *Waltz* in *Francis-Newell* is dicta; second, *Waltz* was decided under pre-1987 law; and finally and most importantly, *Waltz*, under current law, is probably incorrect.

The entire reasoning of *Waltz* – reasoning that arose out of the insurance policy language, not the statute – is based on this statement:

> there could be nothing with which liability could be fastened on the plaintiff. It would require some form of control over the operation of the automobile on the part of the plaintiff, or some active negligence on her part to establish her liability. That being true, plaintiff, in her capacity as

> merely a passenger, was not included within the definition of insured under the liability section of the policy.

526 S.W.2d. at 344 . It is questionable whether this is correct under current law. In *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605 (Mo. 2008), this Court held a passenger can be liable as a principal of the driver merely by choosing the destination. In *Manley v. Horton*, 414 S.W.2d 254 (Mo. 1967), this Court held a passenger can be liable on a joint venture theory.

What is not important in this appeal is the fine contours of *Bach* and *Manley*. What is important is that if a passenger is sued on the theories presented in those cases, or if they simply grabbed the steering wheel, *Gibbs v. National Gen. Ins. Co*., 938 S.W.2d 600 (Mo. App. 1997), the policy should cover them as an insured. The mistake the *Waltz* court made was in assuming the passenger would have to be liable to make a passenger an insured. That would require a court – and, by extension, the policy choice made by the legislature – to judge someone liable before they could be considered an insured. But insurance does not work that way. A passenger is always potentially liable, and is therefore an insured merely because they could be sued, like the driver, on a variety of legal theories.

As a result, a passenger is an insured as far as the liability policy is concerned. It does not matter if the passenger actually was a principal, a participant in a joint venture, a grabber of a steering wheel; if the allegation was

made, the insurance policy would have to defend them. The passenger is, like the driver, always a potential insured.

Ms. Steele's argument here is consistent with statutory interpretation rules. As this Court stated in *Howard v. City of Kansas City*, 332 S.W.3d 772, 787 (Mo. 2011);

> The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result. Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue. *Parktown Imports, Inc. v. Audi of America, Inc*., 278 S.W.3d 670, 672 (Mo. banc 2009). "If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Scott v. Blue Springs Ford Sales, Inc*., 215 S.W.3d 145, 161 (Mo. App. 2006).

The plain meaning of "using" is consistent. From Webster's New World Dictionary, "use" means "to put or bring into action or service, employ for or apply to a given purpose." From Black's Law Dictionary, "to make use of, to convert to one's service, to avail one's self of, to employ." A passenger certainly fits those definitions.

Marchand v. Safeco Ins. Co., 2 S.W.3d 826 (Mo. App. 1999), has nothing to do with the issues raised in this appeal. The argument made by the insured in that case was that the permissive use exclusion violated public policy. The court held it did not. This appeal would not disturb that ruling. The law allows a permissive use exclusion, and the core of this appeal is that a passenger is using a vehicle. If they are "using" the vehicle without permission, the passenger is still excluded from coverage. Mo. Rev. Stat § 303.190.2(2).

The appellate court below in its decision relied on a statement in *Marchand,* 2 S.W.3d at 830, that because the MVFRL applies to owners and operators, it does not require the policy to provide coverage to anyone but the owner or operator. Though said in the context of discussing a permissive use exclusion, and hence *dicta* for our purposes, it is also incorrect for a number of reasons. First, other courts, in a context more akin to what is presented in this case, have disagreed. *American Standard Ins. Co. v. Dolphin*, 801 S.W.2d 413 (Mo. App. 1990). Second, this Court has disagreed. "The financial responsibility law is not intended to protect negligent motor vehicle operators; the purpose is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators." *State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523, 527 (Mo. 1995). Third, the statute itself disagrees. The insurance policy "shall insure the person named therein and any other person . . . ." Mo. Rev. Stat. § 303.190 (emphasis supplied).

As a result, "using" should be given its common meaning. Passengers are insureds under the policy, and therefore should be given uninsured motorist protection. This is required by Missouri public policy as expressed by the legislature; the definitions in the policy simply do not matter.

CONCLUSION

In *Byers*, the court stated "old law is not necessarily bad law." 271 S.W.3d at 40-1. Unfortunately, the *Byers* court stumbled into one of the few situations where this truism turned out not to be true. Public policy as set forth by the Missouri General Assembly now requires the insurance policy to provide coverage here. As a result, this Court should reverse the judgment in favor of the insurance

CERTIFICATE OF COMPLIANCE

David Knieriem, the undersigned attorney for Plaintiff/Appellant, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Appellant's Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 3,663 words, and 322 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),
5. The file of this Appellant's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

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Certificate of Service

A copy of the foregoing was filed in the electronic case management system this 31st day of August, 2012 to be served on the parties through that system.

/s/ David C Knieriem